

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

September 25, 2007 Session

STATE OF TENNESSEE v. JERRY WAYNE WRIGHT

Direct Appeal from the Criminal Court for Monroe County

No. 04-089 Carroll L. Ross, Judge

No. E2006-02030-CCA-R3-CD - Filed January 17, 2008

A Monroe County Criminal Court jury convicted the appellant, Jerry Wayne Wright, of second degree murder and possession of drug paraphernalia, and the trial court sentenced him to consecutive sentences of twenty and two years, respectively. On appeal, the appellant contends that (1) the trial court should have suppressed his statement to police because the police did not have probable cause to arrest him; (2) the evidence is insufficient to support his second degree murder conviction because the State did not prove he killed the victim “knowingly”; (3) the trial court should have granted his request for a continuance; (4) the trial court erred by failing to grant his request for a mistrial when a State witness testified that the appellant had been held in continuous custody since his arrest; (5) the trial court should have granted his request to sever the offenses; and (6) his sentences are excessive. Upon review of the record and the parties’ briefs, we affirm the appellant’s convictions. However, because the trial court committed reversible errors during sentencing, we remand the case for a new sentencing hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part, Reversed in Part, and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Robert L. Jolley, Jr., Knoxville, Tennessee, for the appellant, Jerry Wayne Wright.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Steve Bebb, District Attorney General; and Andrew Mark Freiberg and Chalmers Thompson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

This case arose as a result of the death of thirty-two-year-old Aaron Bradley in March 2004.

Tennessee Bureau of Investigation (TBI) Special Agent Barry Brakebill testified at trial that he investigated the victim's death. On March 23, 2004, he obtained consent to search property in Meigs County that was owned by the appellant's family. At that time, the victim was missing and the police were looking for him. Agent Brakebill searched the property on foot and with cadaver dogs for more than six hours but did not find anything. Nevertheless, Agent Brakebill had the appellant and Steve Hickman "picked up," and Agent Brakebill read the appellant Miranda warnings. The appellant told Agent Brakebill that he wanted to speak with Detective Jim Shaw, and Agent Brakebill later learned that the appellant was going to lead the police to the victim's body. Agent Brakebill followed Detective Shaw and the appellant to a location off Highway 68 in Monroe County known as the Old Tree Farm, and the appellant showed them where he had buried the victim. Agent Brakebill and other officers dug up the area and recovered the victim's body, which was lying face-down and was about three feet under the surface. A methamphetamine laboratory was underneath the victim and included matches, a jar, and tubing. Agent Brakebill attended the victim's autopsy and collected the victim's clothes. A belt had been wrapped tightly around the victim's neck and left an imprint on the victim's skin when it was removed during the autopsy. Blood was on the victim's shirt collar.

On cross-examination, Agent Brakebill testified that he received some of the victim's bodily fluids at the autopsy and that the fluids were sent to the TBI for testing. He acknowledged that methamphetamine was found in the victim's blood and urine. The autopsy revealed that the victim died of asphyxiation, which was consistent with Agent Brakebill's investigation.

Chief Deputy Rusty Vineyard of the Monroe County Sheriff's Department testified that in March 2004, he and other officers went to Steve Hickman's home off Oak Grove Road to look for the appellant. The appellant was not there, so officers waited for him to arrive. When the appellant returned to the home, Deputy Vineyard read Miranda warnings and arrested him. The appellant was taken to the police department and told Deputy Vineyard that the victim was alive. The appellant led Deputy Vineyard to the Tamale Road area in Loudon County, but Deputy Vineyard did not find the victim. Deputy Vineyard called Agent Brakebill and told him "that we were just being jerked around, being led on a wild goose chase." Deputy Vineyard drove the appellant back to the police department, and the appellant later led officers to an area off Frontier Road and Highway 68 in Monroe County, where they found the victim's body. Deputy Vineyard acknowledged that he had attended "DEA school" to learn about methamphetamine laboratories and that he was "meth certified." In the bottom of the victim's grave, officers found remnants of a methamphetamine laboratory, including a plastic container, matchbook covers without their striker plates, yellow-stained paper towels, and plastic bags.

On cross-examination, Deputy Vineyard testified that he did not examine the victim's hands for red phosphorus, a precursor for making methamphetamine. No fingerprints were found on the methamphetamine equipment, and no methamphetamine was recovered.

Detective Jim Shaw of the Monroe County Sheriff's Department testified that after officers looked for the victim's body in Loudon County but did not find it, they returned to the sheriff's

department and were standing outside with the appellant. The appellant was smoking a cigarette, and someone asked him if the victim was still alive. The appellant said yes and asked to use the restroom. Detective Shaw took the appellant inside the sheriff's department, and as they walked back outside, Detective Shaw asked him, "You want to tell us where the body is?" The appellant said he would speak with Detective Shaw, and they went into Deputy Vineyard's office. The appellant was nervous but told Detective Shaw the following: The appellant and the victim had been making methamphetamine in Meigs County. They would make the drug there and then take it to Monroe County and hide it in the woods behind the Wright property. On the day of the victim's death and while the appellant and the victim were still in Meigs County, the appellant took a gun off the victim's person while the victim was not looking. The appellant put the gun in his pocket to keep it away from the victim. In Monroe County, the appellant and the victim got into an argument because the victim owed the appellant six hundred dollars and the appellant wanted his money. The appellant pushed the victim, and they fought. The appellant put the victim in a headlock and kept holding onto him. The victim went limp, and the appellant got scared and left the area. He returned after dark, dug a hole, secured a belt around the victim's neck, and dragged him to the hole. Detective Shaw said that after the appellant confessed to killing the victim, the appellant was relieved and started crying.

Detective Shaw testified that the appellant led the police to the victim's grave off Frontier Road in Monroe County. After the police excavated the victim's body, Detective Shaw spoke with the appellant again. Detective Shaw was aware that Deputy Vineyard and Agent Brakebill had already Mirandized the appellant, but he had the appellant sign a waiver of rights form. He then took the appellant's written statement. According to the written statement, the victim owed the appellant two hundred thirty dollars but was going to pay the appellant six hundred dollars for the appellant's "going in stores to buy meth components." The appellant and the victim would hide the components off Frontier Road in Sweetwater, Tennessee. On the day of the victim's death, the appellant did not have any money and wanted the victim to "pay up." The appellant and the victim fought and put each other in a headlock. The victim started kneeing the appellant in his side, the appellant kept holding the victim in the headlock, and the victim went limp. The appellant stated that he did not mean for the victim to die and that he tried "pumping" on the victim's chest to revive him. The appellant went to Steve Hickman's house, where he hid the gun that he had taken off the victim. He later returned to the scene, buried the victim, and put the methamphetamine components underneath him. Detective Shaw stated that Hickman consented to a search of his home, and Detective Shaw found the gun where the appellant said it would be. While talking with the appellant, Detective Shaw saw that the appellant had two bruises on his side. He stated that since the appellant's arrest, the appellant had been in continuous custody except for five days, when the appellant escaped.

On cross-examination, Detective Shaw testified that Agent Brakebill's testimony was incorrect in that the appellant did not ask to speak with Detective Shaw. Instead, Detective Shaw asked the appellant if he wanted to talk. He acknowledged that he wrote the appellant's statement for him but said that he read the statement to the appellant, allowed the appellant to read it, and had the appellant sign it. He acknowledged that in the statement, the appellant claimed he took the gun off the victim because he was scared of the victim. Detective Shaw also acknowledged that police

used to use headlocks to restrain individuals but that the police did not use the headlocks to kill the individuals.

Dr. Ronald Toolsie testified that he was the designated pathologist for the Monroe County Medical Examiner and performed the victim's autopsy. A brown leather belt was around the victim's neck, but no bruising was on the skin, indicating that the belt was put around the victim's neck after the victim's death. Internally, the area around the victim's larynx was bruised, and Dr. Toolsie concluded that significant force was applied to the neck below the level of the belt while the victim was alive. The cause of the victim's death was asphyxiation due to strangulation, and the manner of death was homicide. Dr. Toolsie stated that the cause of the victim's death was consistent with the appellant's statement and that the victim's injury was consistent with the victim's airway having been cut off. He said that the lack of oxygen would cause a person to lose consciousness and that prolonged lack of oxygen caused brain death to begin. In the early stages of strangulation, brain death was partially reversible and nonfatal. In the advanced stages, the damage was nonreversible and death occurred. He stated that brain death would begin about two minutes after oxygen starvation.

Dr. Toolsie testified that he found no marks on the victim's body to indicate that the victim had been in a fight or had struggled before his death. He also did not see offensive or defensive wounds on the victim and did not see any bruising on the victim's chest or any rib fractures to indicate CPR had been performed on him. The victim had scrape marks on the back of one of his arms and on one buttock consistent with the victim's having been dragged on the ground. Blood was coming out of the victim's nose, which was not unusual because the victim was found lying face-down. Dr. Toolsie collected blood and urine, and the victim's toxicology report showed methamphetamine in an amount less than .25 ug/ml was present. Dr. Toolsie explained that the exact amount of methamphetamine could have been anywhere between .01 and .24 ug/ml. Because Dr. Toolsie did not know the exact amount of methamphetamine present, he could not say what effect the drug was having on the victim at the time of his death.

On cross-examination, Dr. Toolsie acknowledged that a lack of offensive or defensive wounds on the victim did not mean a struggle did not occur. He said that if the victim's methamphetamine level had been close to .24 ug/ml, the victim would have been mentally agitated, unable to concentrate, and unusually aggressive. He stated that bruising on a person could last for seven to ten days. The State rested its case, the defense presented no proof, and the jury convicted the appellant of the indicted offenses of second degree murder and possession of drug paraphernalia.

II. Analysis

A. Motion to Suppress

The appellant contends that the trial court should have suppressed his confession and all evidence obtained as a result of the confession because the police did not have probable cause to arrest him at Steve Hickman's house on March 23. Specifically, he argues that the officers had no

independent information that a crime had been committed and that the appellant's sister, who first alerted officers to the victim's possible death, was an unreliable stranger. In support of his argument, he notes that "her information about the location of the body was proved wrong." The State contends that the trial court properly concluded the police had probable cause for the arrest. We agree with the State.

Prior to trial, the appellant filed a motion to suppress his confession. At the suppression hearing, Edwina Wright, the appellant's sister, testified that on March 21, 2004, the appellant telephoned and told her he was coming to visit her in Fairfield, Ohio. The appellant arrived later that day with his children and Steve Hickman. After the appellant took a nap, Edwina Wright spoke with him, and he was upset. The appellant told her he had done something bad and was scared. He told her that he had gotten into an argument with a man, that they had fought, that he put the man in a headlock, and that the man passed out and never regained consciousness. The appellant said the fight had occurred on their father's land. Edwina Wright stated that their father owned land in Meigs County and also rented property in Sweetwater, Tennessee.

Edwina Wright testified that she had been drinking alcohol that day and that she did not remember very well what she did after her conversation with the appellant. The next day, she spoke with her boss, and he went with her to the police department in Fairfield. There, Edwina Wright spoke with Detective Sandy Sears and told Detective Sears about her conversation with the appellant. Later, Edwina Wright gave Detective Sears a written statement. In the statement, Edwina Wright said the appellant claimed he "choked a guy and killed him." She also said the appellant claimed to have buried the victim on their father's property. Wright said she had been drinking alcohol when she gave the statement to Detective Sears.

On cross-examination, Edwina Wright acknowledged that she had multiple prior felony convictions in Florida for burglaries and thefts and that she had one Florida conviction for attempted murder. She acknowledged that her written statement to Detective Sears did not mention that the appellant and the victim had gotten into an argument before the appellant killed the victim. However, she acknowledged that the appellant told her he was scared of the victim and was scared for his life. The appellant did not reveal the victim's name to her, and the Tennessee police did not ask her about her prior criminal record. She stated that on the day of her conversation with the appellant, she had been drinking alcohol and smoking marijuana. She said she did not remember if the appellant told her he was defending himself when he killed the victim.

Officer George Williams of the Monroe County Sheriff's Department testified that on March 22, 2004, Detective Sandy Sears telephoned and told him that a woman had reported that her brother had killed a man in Tennessee and had buried him on their father's property. Officer Williams told Detective Sears to get more information. Shortly thereafter, Detective Sears telephoned Officer Williams and said the woman, Edwina Wright, claimed that her father owned property in Meigs County and that he was living in Sweetwater. Edwina Wright did not know exactly where the victim's body was buried but believed it would be on one of those properties. The property in Sweetwater was on Frontier Road off Highway 68.

Officer Williams testified that he telephoned Edwina Wright. Wright did not know the victim's name and gave Officer Williams a general description of the location of her father's property in Meigs County. She also told him that the appellant was on his way back to Tennessee and that Steve Hickman was with the appellant. Officer Williams telephoned Agent Brakebill and told him "about the property in Meigs County and all that stuff at that time." Agent Brakebill planned to go to Meigs County, and Officer Williams got Steve Hickman's address from the 911 center. Officer Williams began looking for Hickman that night.

Officer Williams testified that the next day, officers went to Hickman's home. Hickman told the officers that the appellant had just left and was expected to return soon. The officers asked Hickman if he knew of anyone who was missing, and Hickman told them that he had not seen Aaron Bradley in two or three weeks. He also told them that Bradley's car was parked at Hickman's house but that the car was "tore up" and that the victim "just leaves it here." About fifteen or twenty minutes later, the appellant arrived and someone put the appellant into a patrol car.

On cross-examination, Officer Williams testified that he did not check Edwina Wright's criminal history and that he did not know of any dead bodies or any missing persons when he spoke with her. Wright's speech was not slurred, and she told Officer Williams that she thought the victim lived with Hickman. When the appellant was arrested, no body had been found and the police did not know if the victim was dead or alive. At some point, Officer Williams spoke with the Meigs County Sheriff, and the sheriff told Officer Williams that he knew of Edwina Wright. However, Officer Williams did not remember the sheriff's telling him that Wright was a "basket case" and unreliable. Officer Williams stated that on March 23, 2004, Agent Brakebill told him to "try to locate [the appellant and Hickman] and see if [Williams] could . . . talk to them." At that time, the police were going to check the appellant's father's property in Meigs County and Sweetwater. Officer Williams was present later with the appellant and Chief Vineyard when the appellant led them to Loudon County. The appellant had been given Miranda warnings at that time, but Officer Williams did not know who read the appellant his rights.

In denying the appellant's motion to suppress, the trial court noted that the appellant told his sister he had killed someone. When the Tennessee authorities went to Steve Hickman's house, Hickman told them that Aaron Bradley had been missing for two or three weeks but that Bradley's car was at Hickman's house. Based on this evidence, the trial court ruled that the police had a right to question the appellant and "take him in to see what was going [on]." The appellant challenges that ruling.

Tennessee Code Annotated section 40-7-103(a)(3) provides that an officer may arrest a person without a warrant "[w]hen a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed [it]." Our supreme court has explained that "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act," constitutes probable cause. State v. Henning, 975 S.W.2d 290, 294 (Tenn. 1998). Courts should determine the existence of probable cause after assessing all of the information available to the officer at the time of arrest. See State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990).

To this end, Tennessee Rule of Criminal Procedure 4(b) provides that in the application for the issuance of an arrest warrant, “[t]he finding of probable cause shall be based on evidence, which may be hearsay in whole or in part provided there is a substantial basis to believe . . . the source of the hearsay is credible . . . and . . . there is a factual basis for the information furnished.” It has long been established that “[w]hile this rule applies itself particularly to warrants for arrest, the same principle must be considered applicable to establish probable cause where an arrest has been made without a warrant.” State v. Raspberry, 640 S.W.2d 227, 228 (Tenn. Crim. App. 1982); see also State v. Tays, 836 S.W.2d 596, 600 (Tenn. Crim. App. 1992).

In support of his argument, the appellant’s brief cites State v. Larico S. Ficklin, No. W2000-01534-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 663 (Jackson, Aug. 27, 2001). In that case, the only information the police had before they arrested the defendant was that he was present when the victim’s mother discovered the victim’s body in a shed but that he left the scene before the police arrived, which was “suspicious.” Id. at *22. This court ruled that those facts did not give the police probable cause to arrest the defendant. Id.

Unlike the situation in Ficklin, in the present case, the appellant’s sister reported to the police that the appellant had confessed to killing a man and that she believed the man’s body was buried on their father’s property. She also told Officer Williams that Steve Hickman was with the appellant and that she believed the unnamed victim lived with Hickman. Based on her information, the police began investigating the case. When they went to Hickman’s house looking for the appellant, Hickman told them Aaron Bradley had been missing for two or three weeks. Although the police did not find the victim’s body when they searched the appellant’s father’s property in Meigs County, Edwina Wright had told the police that her father also rented property on Frontier Road off Highway 68 in Sweetwater and that she believed the victim could be found at one of the two properties. Given that Edwina Wright told the police that the appellant had confessed to killing a man, that she told them the victim lived with Hickman, and that Hickman informed them the victim had been missing for two or three weeks, we believe the police had probable cause to arrest the appellant in order to question him about the victim’s disappearance. We note that despite the appellant’s claim to the contrary, Edwina Wright’s information to the police was presumed to be reliable. See State v. Melson, 638 S.W.2d 342, 354-56 (Tenn. 1982) (providing that information supplied by a known citizen informant is presumed to be reliable); see also State v. Luke, 995 S.W.2d 630, 637 (Tenn. Crim. App. 1998) (providing that a known citizen informant will be deemed reliable if “information about the citizen’s status or his or her relationship to the events or persons involved” is present). Thus, we conclude that the trial court properly denied the appellant’s motion to suppress his confession.

B. Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to support his second degree murder conviction because the evidence does not show he “knowingly” killed the victim. The State argues that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Second degree murder is the knowing killing of another. See Tenn. Code Ann. § 39-13-210(a)(1). Tennessee Code Annotated section 39-11-302(b) defines the culpable mental state of knowing as follows:

“Knowing” refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.

The appellant argues that the evidence fails to show he killed the victim “knowingly” because the appellant put the victim in a headlock during their fight and did not intend for him to die. Dr. Toolsie testified that the victim died of asphyxiation due to strangulation and that the victim’s death was consistent with the appellant’s statement. However, Dr. Toolsie also explained that the lack of oxygen would cause a person to lose consciousness and was nonfatal in the early stages of strangulation but that brain death would begin about two minutes after oxygen starvation. The evidence established that the appellant kept the victim in a headlock and cut off his airway after the victim lost consciousness and went limp. Given that the appellant continued to strangle the victim after the victim lost consciousness, we conclude that a rational jury could find that he knowingly killed the victim.

C. Motion for a Continuance

The appellant contends that the trial court erred by refusing to grant his motion for a continuance. He contends that a continuance was warranted in this case because the State disclosed four days before trial that the victim’s toxicology report showed the victim had methamphetamine in his blood and because the defense did not have time to find a witness who had confessed to killing

the victim. The State contends that the trial court properly denied the appellant's motion. We conclude that the appellant has failed to demonstrate that he was prejudiced by the trial court's denial of his motion for a continuance.

The appellant's trial began on Tuesday, September 27, 2005. The previous day, the defense requested a continuance for two reasons. First, the defense informed the trial court that the previous Friday afternoon, it had received from the State the victim's toxicology report, which showed that the victim had methamphetamine in an amount less than .25 ug/ml in his blood and urine at the time of his death.¹ The defense informed the court that it immediately attempted to contact Stephanie Dotson, the laboratory technician who prepared the report, but had learned that she would be unavailable until October 3. The defense argued that it needed time to get another witness to testify about the report's results because "[i]t is the effect of that amount of methamphetamine on his blood that we are concerned with." The trial court refused to grant the motion for a continuance, stating that the defense could question Dr. Ronald Toolsie, the pathologist who performed the victim's autopsy, about the effect of methamphetamine in the victim's bloodstream.

The defense also requested a continuance because on September 7, 2005, it had learned from Detective Shaw that a man named Marlin Smith had gone to the Monroe County Sheriff's Department on September 5 and had confessed to killing the victim. The defense argued that it had been unable to locate Smith and needed more time to find him. The State informed the court that Smith spoke with Detective Jim Shaw on September 5 and confessed to killing the victim but that he refused to take a polygraph because he said he could not pass one. According to the State, Smith and the appellant were friends. Moreover, after Smith confessed to police, he asked, "Can [the appellant] come home now?" The next day, Smith recanted his confession. The trial court asked Detective Shaw if there was any way to find Smith, and Detective Shaw stated, "No, sir. He was staying with some friends down in Athens. That's all he said, Your Honor." The trial court stated that it was "a little concerned about this Smith thing" but refused to grant a continuance, reasoning that the appellant had confessed to the crime and that Smith "evidently appeared out of nowhere and unsolicited and said he might be involved one day, and the next day said, 'No, that's a lie. I wasn't involved.'"

It is well-established that the decision whether to grant a continuance rests within the sound discretion of the trial court. See State v. Mann, 959 S.W.2d 503, 524 (Tenn. 1997). The trial court's decision may only be reversed if the trial court abused its discretion and the appellant was improperly prejudiced. See State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). An appellant is improperly prejudiced by the denial of a motion for continuance when "a different result might reasonably have been reached if the continuance had been granted." Id.

The State contends that the trial court did not err by refusing to grant a continuance and that any error was harmless because the appellant has failed to show prejudice. We agree that any error was harmless. At trial, Dr. Toolsie testified that the level of methamphetamine in the victim's blood

¹The appellant does not claim that the State intentionally withheld the report.

was less than .25 ug/ml and that the exact amount of methamphetamine could have been anywhere between .01 and .24 ug/ml. The defense asked Dr. Toolsie about the effect of the methamphetamine on the victim at the time of his death, but Dr. Toolsie could not speculate about the drug's effect because he did not know the exact amount of methamphetamine present. He stated that if the amount had been close to .24 ug/ml, the victim would have been mentally agitated and unable to concentrate and would have had unusually aggressive behavior.

Without knowing the exact amount of methamphetamine present, we fail to see how any witness would have been able to testify for the defense about the exact effect of the drug on the victim at the time of his death. We note that in his appellate brief, the appellant contends that he was prejudiced by the trial court's failure to grant a continuance because an expert would have been able to testify on October 3. However, this does not establish prejudice, and the appellant did not have a toxicologist or any other witness testify about the toxicology results at the hearing on his motion for new trial. Similarly, the appellant also has failed to show that he was prejudiced by the trial court's refusal to grant a continuance in order for him to locate Smith. The hearing on the appellant's motion for new trial occurred almost eleven months after the appellant's trial, but the appellant did not have Smith testify at the hearing. Thus, the appellant is not entitled to relief.

D. Request for a Mistrial

The appellant argues that the trial court erred by refusing to grant his request for a mistrial when Detective Shaw testified for the State that the appellant had been in continuous custody since his arrest except for five days, when he escaped from jail. He contends that the jury's hearing about his being in continuous custody "implicat[ed] in the jury's mind that this individual was a dangerous individual and might be in jail for other reasons" and was highly prejudicial. The State argues that the appellant has waived this issue because he did not make a contemporaneous objection and because he refused the trial court's offer for a curative instruction. The record reflects that the appellant did not make a contemporaneous objection to Detective Shaw's statement. In fact, Dr. Toolsie testified after Detective Shaw, and the appellant did not object to Detective Shaw's statement until after the parties had finished questioning Dr. Toolsie. Therefore, we agree with the State that the appellant has waived this issue. See Tenn. R. App. P. 36(a). Moreover, given the strength of the State's case, we discern no plain error. See Tenn. R. App. P. 52(b).

E. Motion to Sever

Next, the appellant claims that the trial court erred by refusing to sever the possession of drug paraphernalia offense from the second degree murder offense. He contends that the offenses did not constitute a common scheme or plan and that, regardless, proof of the possession of drug paraphernalia was prejudicial. The State contends that the trial court properly refused to sever the offenses. We agree with the State.

Tennessee Rule of Criminal Procedure 8(b) states that two or more offenses may be joined in the same indictment if the offenses constitute parts of a common scheme or plan or if they are of

the same or similar character. See Tenn. R. Crim. P. 8(b)(1), (2). Tennessee Rule of Criminal Procedure 13(b) provides that the trial court may order severance of offenses prior to trial if such severance could be obtained on motion of a defendant or the State pursuant to Rule 14. See Tenn. R. Crim. P. 13(b). Rule 14(b)(1) provides that “[i]f two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others.”

Our supreme court has held that “decisions to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion.” State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). “A holding of abuse of discretion reflects that the trial court’s logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case.” State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999).

In examining a trial court’s ruling on a severance issue, the primary consideration is whether the evidence of one offense would be admissible in the trial of the other if the offenses remained severed. See Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000). Essentially, “any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is ‘really a question of evidentiary relevance.’” Id. (quoting Moore, 6 S.W.3d at 239). As such, the trial court must determine from the evidence presented that

(1) the multiple offenses constitute parts of a common scheme or plan, (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses, and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant.

Id. (citations omitted).

We note that this court previously has concluded, “A common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes.” State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995), overruled on other grounds by Spicer, 12 S.W.3d at 447. Typically, common scheme or plan evidence tends to fall into one of the following three categories:

(1) offenses that reveal a distinctive design or are so similar as to constitute “signature” crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction.

Moore, 6 S.W.3d at 240.

In the instant case, the trial court denied the appellant’s motion to sever, stating,

There was discussion in [the appellant's] statement they were making meth. There [were] components found underneath the body where he took the officers, evidently, that confirms that. I think that's clearly admissible. That would come out in evidence that they were making meth. This bolsters his testimony and in effect lends credence to what he says in other things in the statement if they in fact did find meth components at the burial. So I'm denying the motion to sever.

In analyzing the trial court's denial of the motion to sever, we note that the offenses alleged, second degree murder and possession of drug paraphernalia, did not relate to "signature" crimes and were not part of a larger, continuing plan or conspiracy. Therefore, denial of the appellant's motion to sever was proper only if the offenses were part of the same criminal transaction. In the instant case, the appellant told the police that on the day of the victim's death, he and the victim made methamphetamine in Meigs County and hid it in the woods behind the Wright property in Monroe County. They got into an argument, and the appellant killed the victim, buried him, and put the components of the methamphetamine laboratory underneath him. These facts are part of the same criminal transaction.

Next, we must determine whether Tennessee Rule of Evidence 404(b) would have allowed evidence of one offense to be admissible in the trial of the other if the offenses had been severed. Evidence of other crimes may be admissible to show identity, motive, intent, guilty knowledge, absence of mistake or accident, or a common scheme or plan. See State v. Morris, 24 S.W.3d 788, 810 (Tenn. 2000) (citing Neil P. Cohen et al., Tennessee Law of Evidence § 404.6 (3d ed. 1995)). In this case, identity was not an issue. Instead, the appellant claimed he did not mean to kill the victim and killed him in self defense. However, the appellant stated in his confession that the victim owed him money for the appellant's having bought the components needed to make methamphetamine and that the appellant wanted his money. We conclude that evidence of the possession of drug paraphernalia was admissible to show the appellant's motive and intent in killing the victim. Moreover, the probative value of that evidence was not outweighed by the danger of its prejudicial effect. Thus, the trial court did not err by refusing to grant the appellant's severance motion.

F. Sentencing

The appellant claims that his sentences are excessive because the trial court relied on enhancement factors that were neither admitted nor found by the jury, a violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004); the trial court improperly enhanced his sentences based upon his prior drug use when there was no evidence of such drug use in the record; the trial court improperly enhanced his sentences based upon his committing burglary in Florida as a juvenile; the trial court improperly enhanced his sentence for the possession of drug paraphernalia conviction based upon his being the leader in the commission of the offense; the trial court improperly enhanced his sentences because the State failed to give the defense notice of his prior convictions; the trial court failed to consider his remorse as a mitigating factor; and the trial court

improperly ordered consecutive sentencing based upon his being a dangerous offender. The State concedes that the trial court erred in sentencing but for a different reason: The trial court improperly sentenced the appellant pursuant to the 2005 amendments to the Sentencing Reform Act of 1989. We agree with the State and conclude that this case must be remanded for a new sentencing hearing.

At the appellant's sentencing hearing, Rhonda Monger from the Tennessee Board of Probation and Parole testified that she prepared the appellant's presentence report. She stated that the appellant had prior convictions for misdemeanor assault by domestic violence in 2001, resisting arrest in 2001, and a 1989 burglary conviction in Florida.

Glanis Bradley, the victim's aunt, read her statement into evidence. According to the statement, the victim was divorced but spent every Sunday with his daughter. He lived beside Bradley's family for eighteen months. During that time, he "walked a very straight line" and passed every drug test. She stated that the victim took a drug test the day before his death and that the appellant should receive a "very long and lengthy sentence" for killing the victim.

Juliette Freeman, the victim's mother, also read her statement into evidence. According to the statement, the victim had three children ages twelve, eleven, and three, and the appellant took away the victim's chance to spend time with them. The appellant also took the victim away from his family. The victim had a drug problem his entire life and was not perfect. However, he had been trying to put the past behind him and always respected his family. She said the appellant had brutally murdered the victim and did not appear to be sorry for the crime.

According to the appellant's presentence report, the then thirty-four-year-old appellant only completed the sixth grade and did not obtain his GED. He stated in the report that he was in good physical and mental health and that he was not taking any prescription medications. The appellant reported that he began using "weed" when he was thirteen and that he used methamphetamine for four months when he was thirty-two years old. The report shows that the appellant worked for Seaton Iron and Metal Incorporated for one month in 2003, Optimum Staffing for about four and one-half months in 2003, and Southeastern Distributors from March 2001 to January 2003. According to the report, the appellant has prior convictions for misdemeanor assault, misdemeanor evading arrest, and felony burglary.

The trial court noted that the range of punishment for the second degree murder conviction, a Class A felony, was fifteen to twenty-five years and that the range for the possession of drug paraphernalia conviction, a Class E felony, was one to two years. See Tenn. Code Ann. § 40-35-112(a)(1), (5). The trial court applied enhancement factor (1), that the appellant "has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range," based on his prior criminal convictions and behavior. Tenn. Code Ann. § 40-35-114(1) (2006). The trial court "place[d] significance" on the fact that one of the appellant's prior convictions, domestic assault, involved violence against a person and stated that the appellant was "going out to get drugs." The trial court also applied enhancement factor (16), that the appellant "was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a

felony if committed by an adult,” to both sentences for his Florida burglary conviction and applied enhancement factor (2), that the appellant was a leader in the commission of the offense, to the sentence for possession of drug paraphernalia. See Tenn. Code Ann. § 40-35-114(2), (16) (2006). The trial court applied no mitigating factors and enhanced the appellant’s sentence for the murder conviction from fifteen years to twenty years and enhanced the sentence for the possession of drug paraphernalia conviction from one year to two years. Regarding consecutive sentencing, the trial court found the appellant to be a dangerous offender, stating that “I do find that his actions after he killed the victim are applicable in this, because it does reflect his regard for human life, and I do find it applicable to this particular subparagraph of that sentencing criteria. And based on that, I run these sentences consecutive.”

First, we will address the State’s claim that the trial court’s sentencing the appellant pursuant to the 2005 amendments to the 1989 Sentencing Act was improper. The sentencing hearing transcript reveals that at the beginning of the hearing, the trial court announced that “as I understand that new law, I don’t, I no longer start at the mid-range. I start at the 15 years. Is that everyone’s understanding?” The defense and the State said yes. However, just before the trial court announced the appellant’s sentences, the State informed the trial court that because the appellant had not signed a waiver to be sentenced under the new law, the trial court should sentence the appellant under the prior law. The trial court refused, stating, “Well, I’m not for sure that’s what the Supreme Court says, which tells me what the law says, quite frankly.” For the second degree murder conviction, the trial court “started” at fifteen years, and enhanced the appellant’s sentence to twenty years to be served at one hundred percent. For the drug paraphernalia conviction, the trial court started at one year and enhanced the appellant’s sentence to two years to be served as a Range I, standard offender.

For offenses committed prior to June 7, 2005, sentencing was governed by prior law, which provided for “presumptive” sentences. The presumptive sentence was the midpoint in the range for Class A felonies and the minimum in the range for all remaining felonies. See Tenn. Code Ann. § 40-35-210(c), (d) (2003). Trial courts then were to enhance and/or mitigate a defendant’s sentence based upon the application of enhancement and mitigating factors. See Tenn. Code Ann. § 40-35-210(d), (e) (2003). In Blakely, the United States Supreme Court concluded that the “‘statutory maximum’ for Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 542 U.S. at 303, 124 S. Ct. at 2537; see also Gomez v. Tennessee, ___ U.S. ___, 127 S. Ct. 1209 (2007). In response to Blakely, our legislature amended Tennessee’s sentencing scheme and eliminated presumptive sentences. The Compiler’s Notes to Tennessee Code Annotated section 40-35-210 (2006) provide that

for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant’s ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

In the present case, the appellant committed the offenses in March 2004 and was sentenced in November 2005. Therefore, the trial court should have sentenced him under the prior sentencing law unless the appellant executed a written waiver of ex post facto protections. See State v. Jarvis Harris, No. W2006-02234-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 678, at *30 (Jackson, Aug. 24, 2007); State v. Marco M. Northern, No. M2005-02336-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 459, at **52-53 (Nashville, June 11, 2007). Moreover, the trial court was under the mistaken belief that pursuant to the new sentencing provisions, the presumptive sentence for each offense was the minimum in the range. However, the new sentencing law eliminated presumptive sentences. The State contends that due to the trial court's error, this court should increase the appellant's sentence for second degree murder from twenty to twenty-five years. We believe this case should be remanded for a new sentencing hearing for the appellant either to be sentenced under the pre-2005 amendments or to execute a waiver of his ex post facto protections and for the trial court to sentence the appellant without consideration of presumptive sentences.

Nevertheless, due to the possibility of further appellate review, we will address the appellant's claim that his sentences are excessive. As for the appellant's argument that the trial court could not apply enhancement factors in light of Blakely, we conclude that Blakely is not implicated in this case because the trial court sentenced the appellant, albeit improperly, pursuant to the 2005 amendments to the Sentencing Act of 1989. As for the appellant's claim that the trial court improperly applied enhancement factor (1) for his prior drug use when there was no evidence of any drug use in the record, we disagree. In our view, the trial court's statement that the appellant was "going out to get drugs" was referring to the appellant's confession in which he said he was buying the drug components necessary to make methamphetamine. The trial court's statement was not referring to drug use by the appellant. In any event, the appellant admitted in his presentence report that he used marijuana and methamphetamine.

Regarding the appellant's claim that the trial court improperly enhanced his sentences based upon his juvenile adjudication in Florida for burglary, we conclude that the trial court improperly applied enhancement factor (16). According to the appellant's presentence report, the appellant committed the burglary when he was seventeen years old and was sentenced to three years in the Florida Department of Corrections. The State also introduced into evidence a certified judgment from the Ninth Judicial Circuit of Florida, an adult court, showing that the appellant pled guilty to burglary of a dwelling when he was eighteen years old. That court sentenced him to the Department of Corrections with a recommendation that he serve the sentence in a youthful offenders program. Thus, the record reflects that although the appellant committed the burglary as a juvenile, he was convicted and sentenced as an adult. He was never adjudicated to have committed a delinquent act as a juvenile, and the trial court misapplied enhancement factor (16).

Next, the appellant contends that the trial court should not have applied any enhancement factors based upon his prior convictions because the State failed to give the defense notice of the convictions. However, the State is only required to give notice of prior convictions when it seeks enhanced punishment as a persistent, multiple, or career offender pursuant to Tennessee Code Annotated section 40-35-202(a). Finally, the appellant contends that the trial court erred by failing

to mitigate his sentences for remorse because he cried after he confessed to killing the victim. See Tenn. Code Ann. § 40-35-113(13). We note that “genuine, sincere remorse is a proper mitigating factor.” State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995). However, in our view, merely crying after confessing to a crime is not necessarily an expression of remorse and does not justify mitigating a defendant’s sentence. Therefore, the trial court did not err by refusing to apply that factor.

As for consecutive sentencing, the appellant contends that the trial court erred by failing to make specific findings regarding his being a dangerous offender. Tennessee Code Annotated section 40-35-115(b)(4) provides for consecutive sentencing if “[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” In order to support consecutive sentencing based upon a defendant’s being a dangerous offender, a court must find that “(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) ‘the terms are reasonably related to the severity of the offenses.’” State v. Moore, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)). In this case, the trial court failed to address these “Wilkerson factors.” Therefore, upon remand, the trial court must address these factors before imposing consecutive sentences.

III. Conclusion

Based upon the foregoing, we affirm the appellant’s convictions. However, we remand the case for a new sentencing hearing consistent with this opinion.

NORMA McGEE OGLE, JUDGE